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No.

IN THE

Supreme Court of the United States

JAMES BUTTS, RAY COOPER, SHANE TALBOT, RAYMOND BENNETT AND MICHAEL CROSBY,
Petitioners,

vs.

JAMES McNALLY AND JAMES JOHNSON BEY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a convicted killer has a civil remedy under 42 USC § 1983 against a police detective who deliberately continued to question him after a *Miranda* invocation and who said that subsequent statements could not be used against him in court or whether the remedy is exclusion of the evidence at the criminal trial.

Whether the police can violate the Fifth Amendment during custodial interrogations or whether a Fifth Amendment violation can only be complete at trial with the improper admission of evidence.

Whether a reasonable officer, trained by state-sanctioned sources that it was lawful to deliberately continue questioning a suspect after a *Miranda* invocation and that exclusion of evidence at trial is the remedy for a *Miranda* violation, would know that deliberately continuing to question violates the Fifth Amendment and exposes the officer to civil liability under 42 U.S.C. § 1983, or whether such officer is entitled to qualified immunity from suit.

PARTIES TO PROCEEDING

The parties to this consolidated proceeding are: Petitioners Santa Monica Police Chief James T. Butts, Jr., Santa Monica detectives Shane Talbot and Ray Cooper; Los Angeles detectives Raymond Bennett and Michael Crosby; and Respondents James McNally and James Johnson Bey.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Shane Talbot, Ray H. Cooper, James T. Butts, Raymond Bennett and Michael Crosby respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit denying petitioners' qualified immunity.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Court of Appeal's opinion affirming the denial of petitioners' summary judgment motion based on qualified immunity was filed on November 8, 1999. (Appendix A-31) The Ninth Circuit denied rehearing and rehearing *en banc* and amended the opinion on January 8, 2000. (Appendix A-1) The corrected opinion is reported at 195 F.3d 1039 (9th Cir. 1999).

The district court's decision denying petitioners' motion to dismiss on the merits and denying qualified immunity is reported at 922 F. Supp. 327 (C.D. Cal. 1996). The district court's Order Re: Cross Motions For Summary Judgment appears at Appendix B-1. The district court's Order Granting Defendants' Motion for Summary Adjudication; Denying Plaintiffs' Motion For Certification for Interlocutory Appeal; and Granting Defendants' Request For Stay Pending Appeal On Qualified Immunity Issue appears at Appendix C-1.

JURISDICTION OF THIS COURT

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States. This Petition is timely filed within ninety days of the Ninth Circuit's denial of petitioners' request for rehearing. *See* Order and Amended Opinion. (Appendix A-1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision at issue in this appeal is the Fifth Amendment to the Constitution of the United States which provides in pertinent part: "No person...shall be compelled in any criminal case to be a witness against himself..."

The statutory provision at issue in this appeal is 42 USC § 1983 which provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

STATEMENT OF THE CASE

A. The Proceedings Below.

While serving their prison terms, respondents James McNally and James Bey, along with two associations of defense counsel, filed suit against the petitioners and their employers, the Cities of Santa Monica and Los Angeles, in federal district court pursuant to 42 U.S.C. § 1983. Respondents sought declaratory and injunctive relief and money damages, alleging that they were deprived of their Fifth, Sixth and Fourteenth Amendment rights because petitioners deliberately continued to question them, told them that any statements could not be used against them, and obtained incriminating statements from them after they invoked their *Miranda* rights.

Petitioners moved to dismiss the action and, among other grounds, asserted that they were entitled to qualified immunity, because the questioning -- done in accordance with California sanctioned training -- did not violate clearly established constitutional rights of which reasonable police officers would have known.

The District Court dismissed the associations, concluding that they lacked standing, but denied petitioners' qualified immunity defense. In a particularly extreme footnote to its published opinion, the district court likened the petitioners' argument that they relied on their training to Lieutenant Calle's

defense in the infamous massacre at My Lai. *California Attorneys for Criminal Justice v. Butts*, 922 F.Supp. 327 (C.D. Cal. 1996). Despite doing so, the district court invited petitioners to move for summary judgment.

In petitioners' motion for summary judgment, they presented extensive evidence that they had received state-certified training that questioning after an invocation does not violate the Fifth Amendment. The district court granted the motion in part, ruling that the interrogations did not "shock the conscience" or otherwise establish a claim under the Fourteenth Amendment. The court, however, ruled that respondents could proceed on their Fifth Amendment claim, and thereby denied the officers' defense of qualified immunity, and certified the qualified immunity issue for appeal. (Appendix B-1 and C-1)

On appeal, the Ninth Circuit affirmed the district court's denial of qualified immunity. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999). In doing so, the appellate court reiterated and expanded its holding in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (*en banc*), that the Fifth Amendment can be violated at the station house independent of the introduction of evidence at trial, suggested that deliberately questioning after a *Miranda* invocation violates the Fifth Amendment, and stated that the officers should have ignored any training to the contrary. Petitioners moved for

reconsideration or *en banc* review and asked the Ninth Circuit to correct certain mischaracterizations about the interrogations. The Ninth Circuit denied both reconsideration and review but made some of the requested corrections.

B. California's System Of Police Training.

California law establishes a Commission on Peace Officer Standards and Training (POST), as part of the state's Department of Justice, to regulate the training of California's police officers. California Penal Code §§ 13500 *et seq.* POST, in turn, promulgates minimum standards for training peace officers and certifies local training programs. Police Departments throughout the state rely on POST-certified training courses and legal source materials provided by the California Attorney General's Office.

Each of the petitioners in this case received POST-certified training in interrogation techniques. Like officers in most smaller cities, the Santa Monica detectives received such training directly from the state-sponsored programs. Stipulation at Appendix D-1 and G-1. The Los Angeles detectives received their pertinent training through POST-certified, in-house programs, as is typical for larger departments. Specifically, each of the petitioners was trained that a custodial suspect could be lawfully questioned after a *Miranda* invocation. Stipulation at Appendix D-1;

Declarations of Carey, Hill and Talbot at Appendix E-1 through G-1. The detectives relied upon that training in questioning respondents about the brutal killings they were investigating and which underlie this civil case.

C. Bey's Crime and His Interrogation.

On March 6, 1991, LAPD detectives Raymond Bennett and Michael Crosby began their investigation of the murder of 23 year old Michelle Smith. Michelle had been found dead in a trash dumpster wrapped in a blanket and bound with rope. Her throat had been slashed and the back and side of her head had suffered blunt force. As a result of physical evidence found at the scene and witness statements that incriminated James Bey, detectives Bennett and Crosby obtained a warrant to arrest Bey and search his apartment. Significant evidence to incriminate Bey was recovered during the search of his apartment. Armed with this information, Bennett and Crosby returned to the police station to interview Bey.

Bey's 15-minute interrogation was conducted by Bennett and Crosby in the early evening and was tape recorded. Bey was not handcuffed or restrained in any way during the interview and the detectives kept a respectful distance from him while asking him questions. The tape recording establishes that Bennett recited the *Miranda* admonition in a serious and professional manner and that the interview was

conducted in a conversational tone. There is no indication that Bey was physically uncomfortable or emotionally upset.

After confirming that he was a murder suspect, Bey invoked his right to silence and his right to an attorney. The detectives explicitly acknowledged Bey's invocation. Bennett informed Bey that any subsequent statements could not be used in court because he hadn't waived his rights. Bennett continued to question Bey after his invocation to obtain statements that could be used to impeach him if he chose to take the witness stand and lie. Bey was extremely talkative and willingly gave the detectives his account of the events on the night of the murder.

The detectives had received POST-certified training that noncoercive questioning of a suspect after an invocation of *Miranda* rights was constitutionally permissible, and that any voluntary statements obtained during such questioning could be used for impeachment. The LAPD detectives' questioning of Bey was consistent with a Ninth Circuit panel decision issued just one month earlier holding that "a continued interrogation after a defendant invokes his *Miranda* right to counsel does not violate the Fifth Amendment" and that "a violation of *Miranda* rights is not itself a violation of the constitution." *Cooper v. Dupnick*, 924 F.2d 1520, 1527-28 (9th Cir. 1991). Training materials issued the same month, citing the *Cooper* panel decision, so informed officers and added that such questioning

would not create civil liability. *See California Attorneys for Criminal Justice*, 195 F.3d at 1051-52 (dissent).

Before Bey testified at his murder trial, the judge ruled that the statements he made during the post-invocation questioning were voluntary and admissible to impeach his credibility if he testified. Bey testified, was impeached with the statements he had made to Bennett, and was convicted of murder. Bey appealed his conviction based upon the admission of the statements, but the California Court of Appeals held that the admission of Bey's statements was harmless error in light of the overwhelming evidence of his guilt. *People v. Bey*, 21 Cal.App.4th 1623 (1993).

D. McNally's Crime And His Interrogation.

On March 1, 1993, Santa Monica police found James Jones lying naked, bloodied and dead on his own bed, having been stabbed at least 16 times.

Detective Shane Talbot investigated the scene and concluded that while the violence of the crime was clear, the killer's state of mind was not. Talbot Declaration at Appendix G-1. The presence of a bloody kitchen knife, blood spattered around the bed, an adult video in the VCR, the presence of semen and body hairs on the victims bedding which were not his, and the absence of a struggle all suggested that the crime had been committed

by surprise and in the heat of passion. Because the apartment was ransacked, the victim's car was missing, and neighbors had earlier seen the victim with two male strangers, the evidence suggested that the killing might have been part of a pre-meditated burglary involving multiple suspects.

The next day, Talbot and Sgt. Ray Cooper flew to Arizona to interview James McNally who had been arrested there driving Jones' car. McNally had already confessed to Arizona police that he killed Jones, but he claimed self defense.

The detectives interviewed McNally for about 75 minutes, seated at a table in a "day room". McNally was neither handcuffed nor restrained. During the tape-recorded interview, Talbot recited the *Miranda* admonition and both detectives questioned McNally in a conversational tone, never raising their voices, and never receiving any indication from McNally that he was physically or emotionally uncomfortable. Talbot Declaration Appendix G-1.

McNally waived his *Miranda* rights and told a story of killing Jones in self defense. He said that he was a transient fleeing a Pennsylvania warrant, that Jones offered him a place to sleep, and that, as he came out of the bathroom in Jones' apartment, Jones suddenly assaulted him with a knife demanding sex. McNally claimed that in fending Jones off, he stabbed him to death. The detectives told McNally that this story was inconsistent with the evidence. Thereafter,

McNally invoked his right to counsel.

In response, Talbot and Cooper did not stop questioning, which was unusual. Although each detective had conducted dozens of interrogations, they continued to question after *Miranda* invocations in very, very few cases. However, they were trained that they could continue questioning, if necessary, without violating the suspect's Fifth Amendment rights. In order to find out whether McNally killed Jones in the heat of passion or as part of a pre-meditated residential burglary - they continued to question Jones. The distinction was important to determine whether or not Jones could be charged with murder or some lesser offense. The detectives also wanted to make sure there were no accomplices and to locate Jones' stolen property.

Talbot and Cooper explicitly acknowledged McNally's invocation and noted its consequences. Talbot told McNally that because he had invoked his rights, subsequent statements could not be used against him, and Cooper added that they could not be used in the case in chief. McNally said he would talk to them again after talking to a lawyer. In response, Talbot made a disparaging and unprofessional remark about McNally's lawyer and said he would not believe anything McNally said after talking to a lawyer. The interview tape gives no indication that this remark, which was made in a conversational tone, upset McNally. After a brief exchange, McNally resumed answering questions.

This time, McNally told the detectives an entirely different story. He said that he and Jones had consensual sex and that Jones irritated him by asking for more sex. McNally then went to the kitchen, got a knife, and returned to bed with the knife hidden. The next time Jones touched him, McNally rolled over and stabbed Jones to death. McNally then ransacked Jones' apartment and fled the state, pausing only to sell some of Jones' belongings. The detectives believed McNally's confession was truthful and squared with the evidence they found at the crime scene.

McNally was charged in California with murder. Based upon his confession, which showed that the killing was not part of a pre-meditated burglary, the prosecutor did not seek the death penalty. McNally represented himself at trial. His confession of murder was not used against him because the trial judge excluded it for all purposes. McNally took the stand and told the jury his story of self-defense. The jury apparently believed him; they convicted him of manslaughter.

REASONS FOR GRANTING THE PETITION

This case meets every criteria established by this Court in Rule 10 for concluding that a case merits review on certiorari. As a matter of law, the Ninth Circuit's decision conflicts both directly and in principle with decisions of both this Court and of the other federal appellate courts. It also conflicts with a decision of the California Supreme Court.

Most important, the Ninth Circuit's decision destroys the balances fundamental to our criminal justice system and to law enforcement. In its post-*Miranda* cases, this Court has weighed society's need to do justice based upon the truth, against the need to protect the individual rights of criminal defendants; and has struck a balance which effectuates our fundamental democratic goal of protecting both one and all. In its qualified immunity decisions, this Court has weighed our common need for peace and safety against individual needs to be free from police abuse. In both lines of cases, this Court has successfully fashioned a balance which harmonizes these needs and goals. The Ninth Circuit has destroyed that balance, and only this Court can restore it.

Moreover, effective restoration can only occur in this case. This Court's upcoming decision in *Dickerson v. United States*, Docket No. 99-5525, in which the Court has granted certiorari to determine whether 18 USC § 3501 is a constitutional enactment or an improper Congressional attempt to legislatively overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), may lay to rest claims that violating the *Miranda* procedures violates the Constitution. However, *Dickerson* will likely not resolve the question of whether the Fifth Amendment may be violated solely by conduct occurring during an interrogation, and certainly will not resolve the question of whether qualified immunity shields officers who rely on their certified training.

I. The Ninth Circuit's Decision Conflicts With This Court's Holding That The Fifth Amendment Is A Trial Right And Conflicts In Principle With The Balance This Court Has Struck Between Society's Needs For Just Law Enforcement And Individual Rights.

A. The Ninth Circuit Ignored This Court's Holding That The Fifth Amendment Can Only Be Violated At Trial.

This Court has clearly and consistently stated that the Fifth Amendment right against self-incrimination is a *trial* right. *See Malloy v. Hogan*, 378 U.S. 1 (1964) and *Withrow v. Williams*, 507 U.S. 680, 691 (1993). "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Apparently more concerned with controlling the police than with following controlling precedent, the Ninth Circuit jumped the track in *Cooper v. Dupnik* by holding that a Fifth Amendment violation may occur even when a statement taken in violation of the *Miranda* procedures is never used in a criminal proceeding.

Cooper, 963 F.2d at 1238-45. Reasoning to reach its desired result in *Cooper*, the Ninth Circuit emphasized the dangers inherent in custodial interrogation and simply asserted, without supporting authority, that a Fifth Amendment violation occurred at the station house in that case because certain of Cooper's statements "could have been used against him."

The Ninth Circuit's Fifth Amendment holding in *Cooper* conflicted with this Court's precedent when the decision issued. However, the result in that case was correct because the interrogation was admittedly unconstitutional. The officers testified, in deposition, that they intentionally formulated a plan to violate the constitutional rights of the first suspect arrested with the goal of evulsing a confession. They also testified that, during the interrogation, they knew they were violating Cooper's constitutional rights. Their conduct clearly "shocked the conscience," thereby violating the Fourteenth Amendment. Moreover, the Ninth Circuit's decision noted that mere benign questioning after a *Miranda* invocation did not violate the Fifth Amendment. Thus, the decision created considerable ambiguity about what type of questioning is constitutionally permissible after a Miranda invocation.

After *Cooper* was decided, this Court clarified that the scope of the Fifth Amendment does not extend outside the courthouse even for the salutary purpose of maximizing protection of personal privacy. *See United States v. Balsys*, 524

U.S. 666 (1998). The *Balsys* decision should have stopped the Ninth Circuit in the pending case from proceeding down the road it had explored in *Cooper*. However, it did not. The decision in this case, and its decision in *Henry v. Kernan, 177 F.3d 1152 (9th Cir. 1999)*, eliminate any ambiguity in the Ninth Circuit's position: the Ninth Circuit holds that the Fifth Amendment may be violated in an interrogation independent of whether the self-incriminating statements are ultimately used at trial. Thus, despite the admonition in *Balsys*, the Ninth Circuit has compounded its own error and careened even further afield from the boundaries of this Court's Fifth Amendment precedent. In doing so, it has elevated the *Miranda* procedures to the level of constitutional rights in clear contradiction of this Court's repeated and explicit admonitions to the contrary. *See Michigan v. Tucker,* 417 U.S. 433, 446 (1974); *New York v. Quarles,* 467 U.S. 649, 654 (1984); *Moran v. Burbine,* 475 U.S. 412, 424-25 (1986).

This transmutation of the *Miranda* procedures into constitutional rights also conflicts with the numerous decisions of this Court and other courts, including the Ninth Circuit, approving the admissibility of derivative evidence obtained without *Miranda* compliance -- recognizing that constitutional rights have not been violated when *Miranda* procedures were not followed. *See e.g. Michigan v. Tucker,* 417 U.S. at 433; *Oregon v. Elstad,* 470 U.S. 298; *United States v. Polanco,* 93 F.3d 555 (9th Cir. 1996); *United States v. Morales,* 788 F.2d 883 (2d Cir. 1986).

B. The Ninth Circuit's Decision Also Overlooks This Court's Decisions Which Strike A Balance Between Society's Needs, With Suspects' Individual Rights.

1. The Ninth Circuit Has Ignored This Court's Well-Established Qualified Immunity Doctrine.

The qualified immunity doctrine protects all of us by ensuring that police officers will not shirk their difficult duties from fear of personal liability. *See Hunter v. Bryant*, 502 U.S. 224 (1991). Because our society needs peace and safety, this Court requires that the doctrine be interpreted broadly. Thus, it shields police officers from individual liability for civil rights violations unless they "violate clearly established statutory or constitutional rights..." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 299 (1991). It ensures that, before a police officer will be held individually liable for his or her work, the officer must be afforded clear and fair warning that the conduct violated constitutional rights. *United States v. Lanier*, 520 U.S. 259 (1997).

The Ninth Circuit's decision conflicts with this Court's mandate that the protections afforded

by the qualified immunity doctrine shall be broadly interpreted for the ultimate good of us all. In denying the individual officers' qualified immunity claim, the Ninth Circuit concluded, in effect, that a reasonable officer would know: (1) that intentionally continuing to question after a *Miranda* invocation, in a manner which does not shock the conscience, violates a suspect's Fifth Amendment rights independent of the admission of self-incriminating statements at trial; and (2) that any training to the contrary should be ignored. The first conclusion is legally unsupportable because it conflicts with this Court's precedent. The second is very dangerous.

Our well-being as a society requires police to follow their training; not ignore it. They must conform their work to legal standards communicated to them through state-approved training, and they must be held accountable when they do not. The consequences of sending police the message that each officer should form individual judgments as to the law are predictable and frightening. The best of them will be torn apart by the stress of taking individual responsibility for making legal assessments beyond their expertise in a job which requires split-second decisions. The average will hesitate to enforce the law, taking the safe, but ineffectual course of protecting themselves rather than the public. The worst will become vigilantes.

In this case, the record clearly establishes that interrogation training certified by the State of

California instructed detectives that deliberately continuing to question after a *Miranda* invocation was not, in itself, unconstitutional. The officers who are petitioning this court depended upon that training. They must be shielded by it if we, as a society, expect them to follow it.

The Ninth Circuit indicated that the Fifth Amendment violation in this case consisted not only of petitioners' continued questioning after respondents' *Miranda* invocations but also of the detectives' representation that post-invocation statements could not be used against respondents. The Ninth Circuit said this was deceptive and illegal; in fact, it was neither. In McNally's murder trial, his post-invocation statements were excluded for all purposes. Thus, the detectives' statements were, in fact, true and amounted to a grant of de facto use immunity. *See Kastigar v. United States,* 406 U.S. 441 (1972). In Bey's trial, the post-*Miranda* statements were admitted for impeachment but were held to be harmless error. Thus, even if the detectives' statements were misleading, they were inconsequential. In any event, the appropriate remedy was a criminal appeal. *See Heck v. Humphrey,* 512 U.S. 477 (1994). Thus, the detectives' statements were not a sufficient bases to expose them to civil liability, by denying qualified immunity.

The denial of qualified immunity to the Los Angeles detectives is particularly egregious. Not only were the officers not "afforded clear and fair

warning that their conduct violated constitutional rights," they were entitled to rely upon the panel decision in *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991), issued one month before the Bey interrogation. The *Cooper* panel, which reviewed a very aggressive interrogation, held that "continued interrogation after a defendant invokes his *Miranda* right to counsel does not violate the Fifth Amendment" (*Id.* at 1528) and that "a violation of *Miranda* rights is not itself a violation of the constitution." *Id.* at 1527. Training materials issued the same month as Bey's interrogation, citing the *Cooper* panel decision, informed officers that continuing interrogation after a *Miranda* invocation did not create civil liability. Additionally, the *Cooper* panel decision was consistent with both this Court's precedents and Ninth Circuit law as it existed in 1991. The dissent in this case recognized that detectives Bennett and Crosby are entitled to qualified immunity because, in 1991, it was *not* clearly established law that their conduct -- continuing the interrogation despite Bey's invocation of his *Miranda* rights, stating they could not use his statements in court, and claiming they possessed incriminating evidence -- violated the Fifth Amendment. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1051-52 (9th Cir. 1999).

2. The Ninth Circuit Impermissibly Transmutes *Miranda* Into A License To Commit Perjury.

In its line of decisions clarifying the scope of the *Miranda* holding, this Court has protected the efficacy of the criminal justice system by establishing that, although statements taken in violation of the *Miranda* procedures may not be used to prove guilt, they may be used for impeachment. In *Harris v. New York*, 401 U.S. 222 (1971), this Court held that a statement taken without proper *Miranda* advisements may be admitted for impeachment purposes. In *Oregon v. Haas*, 420 U.S. 714 (1975), this Court considered the possibility that the *Harris* rule might give police an incentive to continue questioning and might therefore result in intentional violations of the *Miranda* procedures. Nevertheless, the Court refused to reconsider the balance struck in *Harris* between exposing perjury and deterring police misconduct. Moreover, in *Michigan v. Harvey*, 494 U.S. 344, 351-52 (1990), this Court again concluded that the value of impeachment to the jury's search for truth outweighed the need to attempt to deter future police violations of rules not compelled directly by the Constitution.

The balance the Court struck in this line of cases ensures that the *Miranda* procedures will not cripple our justice system by depriving juries of the truth. The *Miranda* prophylaxes goes just far enough to ensure that a defendant will not be

convicted out of his own mouth. However, it can go no further without risking both the substantial injustice of criminals escaping the consequences of their acts by lying to juries and wholesale disrespect for the justice system which would threaten our social order and invite vigilantism.

This case demonstrates the reality of that risk. McNally told a jury that he was a victim, rather than a murderer. The judge excluded his murder confession for all purposes. As a result, the jury believed McNally's story of self-defense and convicted him of manslaughter even though he clearly attacked James Jones in Jones' own bed and stabbed him to death as he lay there naked and vulnerable. That was injustice enough. Now, the Ninth Circuit has exponentially increased the wrong by establishing a rule of law in the Ninth Circuit which will inevitably allow untold numbers of others to lie their way out of the consequences of their crimes and potentially recover civil damages.

3. The Ruling Conflicts With This Court's Decisions Establishing That The Fifth Amendment's Focus Is On The Suspect's State Of Mind, Not The Interrogator's.

This Court's decisions establish that the officer's state of mind is irrelevant to a determination of whether the suspect's Fifth

Amendment Rights have been violated. *See, e.g., Stansbury v. California*, 511 U.S. 318, 319 (1994) [whether suspect is in custody for purposes of *Miranda* turns upon his perception, not officer's]; *Rhode Island v. Innis*, 446 U.S. 446 U.S. 291, 293 (1980) [whether interrogation has occurred for *Miranda* purposes depends on suspect's perception, not officer's intent]; *Moran v. Burbine*, 475 U.S. 412 (1986) [existence of knowing waiver of *Miranda* rights depends upon suspect's state of mind, not interrogator's]. The Ninth Circuit ignored this precedent as well by concluding that a Fifth Amendment claim could rest on the officer's intent to continue questioning, rather than on the suspect's state of mind.

II. The Ninth Circuit's Ruling Greatly Exacerbates A Direct Conflict In The Circuits On Fifth Amendment Law And The Remedies For *Miranda* Violations.

A. All Other Circuits Follow The Rule That A Suspect's Fifth Amendment Rights May Only Be Violated At Trial.

The Ninth Circuit ruling below rejects established holdings of this Court that a Fifth Amendment violation can only occur at a criminal trial with the admission of a statement taken in violation of *Miranda*. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d at 1045. Respondents here have argued that McNally's confession of murder was used against him at his

sentencing hearing -- in fact the record shows that the trial judge did not consider it in sentencing him. However, even if respondents were correct, McNally's confession was excluded at his criminal trial for all purposes. Although Bey's statements were used to impeach him, the admission of the statements was harmless error. Thus, the Ninth Circuit's decision clearly holds that Fifth Amendment rights may be violated at the station house.

The Fourth Circuit recently rejected a detainee's claim that his Fifth Amendment rights were violated during a custodial interrogation and summarized the law on this point in the various circuits: "[M]ost courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a criminal proceeding .... Indeed, only the Ninth Circuit has held that a Fifth Amendment violation may occur even when compelled statements are never used at a criminal proceeding." *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) *citing Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994); *Mahoney v. Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992); *David v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987); *Cooper v. Dupnik*, 963 F.2d 1220, 1238-45 (9th Cir. 1992).

The Ninth Circuit's error is compounded because it is at odds with the other circuits on the availability of a civil remedy for *Miranda* violations and on the issue of qualified immunity for Fifth Amendment violations. See *infra* pp. 24-27.

B. Only The Ninth Circuit Concludes That There Is A Civil Remedy For *Miranda* Violations.

Because the other circuits recognize that suspects do not have a constitutional right not to be questioned and also recognize that the Fifth Amendment can only be violated at trial, they have uniformly recognized that the remedy for a *Miranda* violation is exclusion of the evidence from the criminal proceeding, and not money damages under § 1983. Thus, in *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976), the court declined to subject police officers to civil liability for questioning outside of *Miranda* because:

> The Constitution and Laws of the United States do not guarantee ... the right to *Miranda* warnings[] ... it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give *Miranda* warnings subjects a police officer to liability under the Civil Rights Act.

The Eighth Circuit reached the same conclusion in *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1436 (8th Cir. 1989). ["The reading of *Miranda* warnings is a procedural safeguard rather than a right arising out of the Fifth Amendment itself ... Thus,

the remedy for a *Miranda* violation is the exclusion from evidence of any compelled self-incrimination, not a section 1983 action."] The Tenth Circuit reiterated this rule in *Lucero v. Gunter*, 17 F.3d 1347, 1350 (6th Cir. 1994), and the Second Circuit agreed in *Neighbor v. Covert*, 68 F.3d 1508 (2nd Cir. 1995).

Last year, the Eleventh Circuit in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), eliminated the distinction between the arguably inadvertent failure to give *Miranda* warnings and the intentional questioning of a suspect who has invoked *Miranda* rights. The court, citing *Giuffre*, *Bennett* and *Warren*, rejected the Ninth Circuit's view and stated: "We agree with the Third, Seventh, Eighth, and Tenth Circuits that failing to follow *Miranda* procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under section 1983 is created."

C. Similarly, The Ninth Circuit's Position Denying Qualified Immunity Conflicts With Other Circuits.

In *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999), the court decided that, at minimum, the officers should have been granted qualified immunity because there was not a clearly established Fifth Amendment right. This is the

same conclusion which the Third Circuit reached in a case similar to this one, *Giuffre v. Bissel*, 31 F.3d 1241 (3rd Cir. 1994). In that case, Giuffre, who was read his rights, alleged clear police misconduct during an interrogation, including officers threatening to lock up his girlfriend, take away her handicapped son and shoot his dogs. The court concluded that qualified immunity shielded the officers from civil liability for alleged violations of the Fifth Amendment. In reaching this result, the court expressly declined to adopt the Ninth Circuit's holding that the Fifth Amendment may be violated in the station house and opted instead to join the Fourth Circuit which had previously held in *Wiley v. Doory*, 14 F.3d 993, 997-98 (4th Cir. 1994) that qualified immunity shields officers in this situation.

This Court should act to bring the Ninth Circuit into the fold. Otherwise, officers in this Circuit, alone, will be forced to choose between finding the truth and protecting themselves.

III. The Ninth Circuit's Decision Conflicts In Principle With The California Supreme Court's Position On An Important Issue Of Law Because It Shifts The Focus In Determining Coercion From The Suspect's Mental State To The Mental State Of The Officer's.

In *People v. Peevy*, 17 Cal.4th 1184 (1998), the California Supreme Court considered whether an officer's *deliberate* continued questioning after

a custodial suspect's *Miranda* invocation should make the suspect's post-invocation statements inadmissible for all purposes. Peevy argued that although *Harris v. New York*, 401 U.S. 222, 224, 226 (1971) permits the use of statements taken in violation of *Miranda*, such statements should be made inadmissible for impeachment in order to prevent police misconduct. Lacking a record to support his claim of widespread "abuse", Peevy cited this case to support his claim that, because of *Harris*, officers routinely ignore suspects' invocation of the right to remain silent or to counsel.[1]

In response, the California Supreme Court carefully reviewed this Court's post-*Miranda* decisions, focusing on the balance they strike between the need for jurors to hear the truth and the need to protect a suspect's rights. The California Supreme Court emphasized two basic principles extended by this Court's precedent: first, the "search for truth" outweighs the speculative possibility that excluding statements for impeachment purposes will deter misconduct; and second, the application of the *Miranda* exclusionary rule depends on the suspect's state of mind – not the officer's. Based upon these principles, the California Supreme Court held that the deliberate continuation of questioning after an

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[1] In fact, the record in this case shows that the Santa Monica defendants very rarely questioned outside *Miranda* and did so in this case for the purpose of ensuring proper charging and determining whether there were accomplices to the killing.

invocation did not render a post-invocation confession inadmissible for impeachment purposes.

The Ninth Circuit's decision in this case conflicts with *Peevy*. The Ninth Circuit says or suggests that deliberately continuing to question violates constitutional rights. The Ninth Circuit also concluded that the officer's state of mind, not the suspect's, is dispositive. The California Supreme Court says otherwise. This Court should resolve the conflict.

CONCLUSION

This case demonstrates the gravity and difficulty of formulating and maintaining an appropriate societal response to the ugliest of human realities: people brutally and senselessly kill other people. In addressing this reality, the courts must be guided by our basic needs and values. They require us to do three things. *First:* If we are to live in peace and safety, we must give the police the tools they need to diligently and professionally solve crimes and apprehend those who would harm us. *Second:* If we are to honor and effectuate our commitment to individual rights, we must ensure that the police treat suspects and defendants in a civilized manner. *Third:* If we are to do justice and thereby preserve confidence in the justice system, we must give juries the truth. Over the years this Court has struck a delicate balance allowing us to achieve all three of these potentially conflicting goals.

The Ninth Circuit has destroyed that balance in this case. In its zeal to control the police, the Ninth Circuit has imperiled public safety, the efficacy of the criminal justice system, and -- ultimately -- public faith in that system. How can we respect the law and the justice system if the courts allow a confessed killer to get away with murder, and then allow him to recover civilly from the police officers who relied on state-sanctioned training in questioning him? How can we expect police officers to do their job if we tell them that following their state-certified training will not shield them from potential civil liability or that they cannot rely on a federal appellate court's ruling for fear that it may later be reversed? Petitioners respectfully submit that this Court should grant this petition in order to restore the balance society needs, right the wrong done in this case, and prevent the harm that will ensue if the excesses of the Ninth Circuit's decision are not corrected.

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Respectfully submitted,

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